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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

File: WAC 00 186 55148

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 28 2003**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in August 1998. It is engaged in the import of sport gloves made by an affiliated company. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director uses self-serving arguments and draws conclusions without adequate support.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated the beneficiary's duties as follows:

[The beneficiary] has been directing the entire operation of the company by supervising all employees. He sets goals of the company in terms of sales volume, expansion of customer base, addition of new items, and profitability. He then makes business strategies and plans to achieve the goals and implement them by delegating duties to employees. He coordinates the employees' work to achieve the best results possible and guide them into working in the most efficient manner. He monitors their activities to ensure they are discharging their duties properly and provides them with advice to improve their efficiency. He reviews the results of the employees' work periodically and gives them performance evaluation. He has the ultimate authority to hire or dismiss employees. He also maintains close liaison with the parent company abroad. His decision making [sic] capability is very important to lead the business of [the petitioner].

On January 26, 2001, the director requested a more detailed description of the beneficiary's duties for the petitioner, including the percentage of time the beneficiary spent in each of the listed duties. The director also requested the petitioner's organizational chart and a list and brief description of job duties for the employees subordinate to the beneficiary's position.

In response to the director's request, the petitioner provided a more detailed description of the beneficiary's duties. The petitioner indicated that the beneficiary spent 20 percent of his time studying operational results, the personnel situation, relationships with customers and vendors and sets business policies as a result of his studies. The petitioner indicated the beneficiary spent 20 percent of his time in meetings, discussing issues affecting the business of the company, drawing conclusions from the meetings, and assigning tasks and developing plans to achieve the goals of the company. The petitioner indicated that the beneficiary spent 30 percent of his time carrying out the plans developed by coordinating employees' work, reviewing operational results, and supervising the day-to-day activities of employees. The petitioner indicated that the beneficiary spent 10 percent of

his time evaluating employees' performance and exercising his authority to hire, dismiss, promote, or demote employees. The petitioner indicated that the beneficiary spent 5 percent of his time representing the petitioner at meetings with customers and vendors at trade shows and at meeting with designers of new product lines. The petitioner indicated that the beneficiary spent 5 percent of his time in conferring with the parent company's subsidiary and source of the petitioner's products and receiving general supervision from the parent company. The petitioner indicated that the remaining portion of the beneficiary's time was spent on general managerial and executive duties.

The petitioner also provided brief job descriptions for several individuals employed at the time of the response to the request for evidence. The employees included a vice-president, a sales manager, an assistant sales manager, a market research analyst/assistant technology officer, an administrative manager, and a business consultant.

The director again requested evidence in November 2001. The director noted the discrepancies between the number of employees on a California Form DE-6 filed with the petition and the number of employees listed in the first response to the director's request for evidence. The director requested the petitioner's latest Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return and a description of duties for each employee listed on the Form. The director also requested evidence of wages paid to any employees not listed on the IRS Form 941. The director further requested the petitioner's organizational chart listing the petitioner's employees working at the time the petition was filed on June 5, 2000.

In response, the petitioner provided its organizational chart as of June 5, 2000. The chart depicted the beneficiary as president, and individuals identified as a sales manager¹, an assistant sales manager, and an administrative manager. The petitioner noted in its response that the IRS Form 941 was not used to list employees; consequently it instead submitted its California Form DE-6, Quarterly Wage Statement. The California Form DE-6 for the quarter ending June 30, 2000 showed individuals corresponding to the positions of president, sales manager, assistant sales manager, administrative manager, and one individual whose position was not identified on the June 5, 2000 organizational chart.

The director determined that the petitioner had not established a reasonable need for an executive because it was a small four-employee importer and seller of sport and work gloves. The director also determined that, because the company only had three employees in addition to the beneficiary, that the beneficiary

¹ This individual is also identified on the letter in support of the petition, dated April 19, 2000, as the petitioner's vice-president and sales manager.

would necessarily be performing numerous menial tasks. The director also determined that the beneficiary's position was essentially a first-line supervisory position over non-managerial and non-professional employees; thus, the beneficiary did not qualify for this visa classification as a manager. Therefore, the director further determined that the petitioner had not provided sufficient evidence to establish that the beneficiary managed a function rather than performing the operational activities of the petitioner. The director concluded that the beneficiary was not a functional manager.

On appeal, counsel for the petitioner asserts that the director improperly adjudicated the petition based only on the petitioner's staffing level and the facts existing as of June 5, 2000, the date of filing the petition. Counsel also asserts that the description of duties provided by the petitioner demonstrates the beneficiary is performing managerial work rather than performing the operational tasks of the petitioner. Counsel submits an excerpt from the Occupational Outlook Handbook, published by the U. S. Department of Labor that provides a definition of "general manager." The highlighted portion of the excerpt indicates, in part, that in small organizations, general managers are often responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties. Counsel also asserts that the beneficiary, at a later stage of the petitioner's development, supervised a market research analyst and that this individual is a professional. Counsel finally asserts that the beneficiary is managing the function of running the business.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The initial description of the beneficiary's duties described an individual primarily supervising the petitioner's three other employees. The petitioner also indicated that the beneficiary set goals and implemented plans to achieve the goals by delegating duties to the three employees. There is no clear indication that the positions held by any of the three individuals provided a middle tier of management and the beneficiary's job description does not indicate that the petitioner maintained a middle tier of management. In addition, the record does not contain information demonstrating that any of the three positions subordinate to the beneficiary's position are positions that require professional employees. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. See section 101(a)(44)(A)(iv) of the Act.

The director thus requested further information on the beneficiary's actual duties, the organizational structure of the petitioner, and information regarding the duties of the beneficiary's subordinate employees. The director may request

additional evidence when the director finds that the evidence submitted either does not fully establish eligibility or raises underlying questions regarding eligibility for the benefit. See 8 C.F.R. § 103.2(b)(8). The director's purpose in requesting additional evidence is not to allow a petitioner to provide information that establishes eligibility sometime after the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner's submission of a more detailed description of the beneficiary's duties provides additional evidence that the director may consider. Likewise, additional information regarding the duties of the employees employed at the time the petition was filed may also be of assistance in the director's determination.

The petitioner's description of the beneficiary's job duties, in response to the director's request for evidence provides further detail regarding the beneficiary's daily duties. It appears from the detail provided that the beneficiary continues to spend a majority of his time supervising and delegating tasks to his subordinate employees. The petitioner indicates that the beneficiary spends 60 percent of his time implementing plans to be carried out by employees, discussing and assigning tasks to employees, and evaluating employees' performance.

In order to create policies, the petitioner spends another 20 percent of his time studying operational results, the personnel situation, and relationships with customers. It is not possible to determine from this statement whether the beneficiary will be primarily performing executive duties in relation to these tasks or whether these duties are part of the day-to-day oversight of a first-line supervisor endeavoring to make the company successful. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the director mischaracterizes the beneficiary's tasks as menial tasks, the beneficiary is primarily performing first-line supervisory services for the petitioner. The excerpt from the Occupational Outlook Handbook provided by counsel seems to support the conclusion that at the time of filing the petition the beneficiary was the individual responsible for performing these services. There is, however, insufficient information in the file to conclude that the beneficiary spends his time primarily establishing policies, setting goals, and otherwise directing the management of the company.

Counsel's assertion that the beneficiary supervises a professional employee is not persuasive. First, the market research analyst was not employed at the time the petition was filed; thus, the

beneficiary was not supervising a professional employee. Second, the record does not contain sufficient information to establish that the market research analyst's position is a professional position. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertion that the beneficiary manages the entire business and that this is an essential function is also not persuasive. It is not sufficient to define the petitioner's entire operation as an essential function. Rather, the petitioner must provide a description of the actual function(s) and submit evidence showing that the beneficiary manages the functions and does not perform the functions. See *Matter of Church Scientology International*, *supra*.

Although the appeal will be dismissed, it must be noted that the director based her decision in part on an improper standard. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

At the time of filing, the petitioner was a two-year-old importing company. The firm employed the beneficiary as president, a sales manager, and assistant manager, and an administrative manager. To determine the reasonable needs of a petitioner, the Bureau must have sufficient information regarding the tasks of the petitioner's employees or independent contractors, independent evidence of the individuals actually compensated by the petitioner for performing necessary tasks, consistent evidence demonstrating the roles of the employees or independent contractors, and an understanding of the nature of the petitioner's business. In the case at hand, the information provided for the verifiable staff on hand at the time the petition was filed is not sufficient to allow a conclusion that these individuals could fulfill the reasonable needs of the

petitioner, thus relieving the beneficiary from performing non-qualifying tasks. The lack of information on this issue, coupled with the beneficiary's job description permits no other conclusion. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the record contains an inconsistency relating to the petitioner's qualifying relationship with the beneficiary's foreign employer. The record contains a stock certificate and stock ledger showing the beneficiary's foreign employer owns 100 percent of the petitioner. However, the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for both the 1999 and 2000 years show that the beneficiary owns 100 percent of the petitioner on Schedule E of said form. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As the petition will be dismissed for the reason above, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.